UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

MANAGEMENT & TRAINING CORPORATION (MTC)
Respondent

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668
Charging Party

Cases 04-CA-095456
04-CA-097114 and
04-CA-104790

RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dated: March 27, 2014

Respectfully Submitted,

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Comes now Management & Training Corporation (hereinafter "MTC," "Respondent," or "the Company"), and files RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in the above-styled case in relation to the hearing held on December 9, 2013, in Philadelphia, Pennsylvania, and in accordance with Section 102.46 of the Board's Rules and Regulations.

Cross-Exception 1, 8-10

The Counsel for the General Counsel ("CGC") filed a Cross-Exception to the ALJ's finding that Ms. Rebarchak "apparently stated that she 'said something but could not recall what she said,'" based on hearsay evidence. (ALJD 4:28-29)(Cross-Exception 1). What the CGC fails to recognize three important points: First, the CGC has the burden of proof as to the allegations in the Complaint as to Ms. Rebarchak and the CGC failed to call Ms. Rebarchak as a witness.

Second, the CGC stipulated to the admission of a document that contained this statement and made no objection. *See*, Exhibit R17.

Third, Exhibit R17 is a record kept in the ordinary course of business and is an exception to the hearsay based on Rule 803(6) of the Federal Rules of Evidence (FRE).

The CGC also makes Cross-Exceptions to the Judge's conclusions that an inference is required in order to find a violation with respect to a written demand from Ms. Rebarchack (Cross-Exception 8), that there was no basis that she would have disciplined had she provided a statement (Cross-Exception 9), and it was "not unreasonable" to force Rebarchak to provide a written statement (Cross-Exception 10). Respondent addresses those CGC Cross-Exceptions below.

I. THE CGC'S CROSS-EXCEPTIONS SHOULD BE DENIED AS THE EVIDENCE SHOWS

THAT MTC DID NOT VIOLATE SECTION 8(a)(1) WHEN, DURING AN INVESTIGATION OF MS. REBARCHAK'S GRIEVANCE, MTC REQUIRED MS. REBARCHAK TO PROVIDE A TRUTHFUL WRITTEN STATEMENT REGARDING THE EVENTS OF THE INCIDENT BECAUSE:

A. **AS PER SECTION 8(b)(3), THE UNION HAS A DUTY TO PROVIDE INFORMATION IN THE CONTEXT OF GRIEVANCE HANDLING;**

B. **AS PER THE CBA AND THE LAW, MTC'S ACTIONS WERE NECESSARY AS IT HAS THE "JUST CAUSE" BURDEN OF PROOF.**

C. **AS PER THE CBA, MS. REBARCHAK HAS A DUTY TO BE SUBORDINATE AND TRUTHFUL;**

The three arguments highlighted above are discussed in detail below:

A. **The Evidence shows that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) by requiring Ms. Rebarchak to give a truthful written statement regarding the events of the incident as per Section 8(b)(3), as the Union has a duty to provide MTC information in the context of grievance handling.**

It is well established that the duty to provide information may stem not just from collective bargaining, but also from the grievance process. NLRB V. Acme Industrial Co., 385 U.S. 432, (1967). The duty to furnish information is not an obligation imposed on employers alone; a similar duty is owed by unions. This principle was established in Oakland Press. Printing & Graphic Communications Local 13 (Detroit) (Oakland Press Co.), 233 NLRB 994 (1977), aff'd, 598 F.2d 267 (D.C. Cir. 1979). The Board has held that a union's duty to furnish information relevant to the bargaining process is parallel to that of an employer.'" Id. at 996. The D.C. Circuit affirmed, holding that just as an employer is required to disclose information, a union "is likewise obligated to furnish the employer with relevant information." Oakland Press, 598 F.2d at 271.[1]

[1] "n13 In Tool and Die Makers' Lodge No. 78, 224 NLRB 111 (1976), an Administrative Law Judge found that a union violated §8(b)(3) by refusing to furnish information requested during a grievance proceeding. The

What the General Counsel is attempting to do in the case at hand with the CGC's Cross-Exceptions, is improperly enforce a per se rule that has been overruled by the D.C. Circuit Court of Appeals in *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712. In *Cook*, the Board had established a per se rule that an employer is barred by Section 8(a)(1) of the Act from using a threat of discipline to compel employees to respond to questions relating to a grievance proceeding that has been scheduled for arbitration pursuant to a contractual grievance-arbitration procedure. Id. at 720-721. The D.C. Circuit Court of Appeals refused to enforce the Board's decision which created a per se rule holding that pre-arbitration interviews are a matter of routine practice in many sectors of industrial relations and are conducted by advocates in preparation for a pending arbitration without any infringement of protected employee rights. The Court held that the per se rule announced by the Board unnecessarily and impermissibly interferes with the manner in which parties to a collective bargaining relationship structure the arbitration process. Id. at 721-722.

Thus, pre-arbitration interviews are a contractual matter to be determined by the parties in establishing a grievance-arbitration procedure. The D.C. Court of Appeals held that an employee does not have an automatic right to refuse to respond to questions concerning a matter that has been scheduled for arbitration. The Court held that it is not the function of the Board to structure the manner in which parties to a collective bargaining agreement process and resolve contract grievances. Just as the Board may not decree the time in which a party must respond to a filed grievance, the Board may not attempt to spur an employer to "a painstaking investigation at the outset" once a grievance

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Board assumed "arguendo," without deciding, that a union's duty to furnish information is parallel to that of an employer. . . ."

is filed. The method in which disputes are resolved through a grievance-arbitration process is a contractual matter to be determined by the parties. The Board may not construct an inflexible rule that any compulsory interview conducted in preparation for a pending arbitration violates the Act. *Id.* at 721-722.

While General Counsel's paragraphs 5(c) and 5(d) of the Amended Consolidated Complaint in this matter misconstrue the facts, and the law as applied to the facts, these two paragraphs reference the two actions by MTC which the CGC solely relies in asserting these Cross-Exceptions and that MTC violated Section 8(a)(1) as to this specific charge (04-CA-097114) of this Amended Consolidated Complaint.

Specifically, paragraph 5(c) of the Amended Consolidated Complaint references the email sent by Ms. Amundsen to Ms. Yost (General Counsel's Exhibit 12). Paragraph 5(d) of the Amended Consolidated Complaint reference the email sent by Ms. Thuringer to Ms. Rebarchak (General Counsel's Exhibit 13). The General Counsel in the Complaint and in the CGC's Cross-Exceptions attempts to utilize Ms. Amundsen's email to Ms. Yost (General Counsel's Exhibits 12) to improperly assert that MTC was interfering with Ms. Rebarchak's Section 7 rights. The CGC in its Brief Supporting its Cross-Exceptions improperly alleges that MTC required Ms. Rebarchak to withdraw her grievance or face discipline. This is an improper interpretation and is not supported by the law or the facts. Ms. Rebarchak could have provided a truthful written statement as that was an option given by the Company and in accordance with Company policy.

The Board, as affirmed by the Fifth Circuit Court of Appeals has held that, "Where a request is rendered moot by subsequent events, the [party receiving the request] has no

statutory obligation to furnish information." Glazers Wholesale Drug Co., 211 NLRB 1063 (1974) *enforced*, 523 F.2d 1053 (5th Cir. 1975), *cert. denied*, 425 U.S. 913 (1976).

In the case at hand, in Amundsen's email to the Yost, (General Counsel's Exhibit 12), Amundsen outlined all the options the employee had in responding to this information request. One of those options was a situation "where a request is rendered moot by a subsequent event," Id., Ms. Rebarchak was not required to provide a written statement if the grievance was subsequently withdrawn because it would render MTC's information request "moot." In fact, Ms. Amundsen's email specifically references the situation and exact term as "moot." (General Counsel's Exhibit 12).

Because MTC was only seeking work related information and was not seeking the Union's communications or strategies for arbitration, MTC's information request to Ms. Rebarchak, and the requirement she respond, was not in violation of Section 8(a)(1). In *Cook*, the Court did identify the limitations "on the permissible scope of a legitimate pre-arbitration interviews. An employer may in certain cases be forbidden from inquiring into matters that are not job-related. An employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration." Id., at 722.

Again, the only two factual allegations made by the General Counsel in its Cross-Exceptions and under this charge are paragraphs 5(c) and 5(d) of the Amended Consolidated Complaint. Those two paragraphs refer to two emails, General Counsel's Exhibits 12 and 13 respectively. Those emails are clear on their face that MTC did **not** seek: 1) the Union's strategy as to the grievance, 2) whether an arbitration would be filed

by the Union, 3) who would testify at any potential arbitration, or 4) any communication between Ms. Rebarchak and any union representative.

General Counsel's Exhibit 12, which is an email sent to Union business agent, Kim Yost, states that MTC was seeking "Heather's written statement." General Counsel's Exhibit 13, which is an email that was sent by the Human Resources Manager to Ms. Rebarchak states in pertinent part, "As part of that investigation, we need to obtain a written statement and consider **your account of the incident resulting in the verbal warning**." (emphasis added.) The requested information was limited to the work related incident, and the incident alone which is also documented in Exhibits R11, R12, R13, R14, R15, and R18. Clearly, Ms. Rebarchak understood that the statement sought by MTC was solely to work related matters surrounding the incident for which she was disciplined. Ms. Rebarchak specifically stated, "I will not be submitting a statement due to the fact that the comments the students accuse me of saying in their statements were never made." Exhibit R18.

When MTC required Ms. Rebarchak to give a written statement as to her account of the work incident as part of MTC's initial investigation, MTC was making a lawful information request to the Union. MTC made this request during the initial investigation (See Exhibits R15 and R17), before any discipline was issued. Specifically, "Based on the written statements received by the two parties involved in conversation and **the lack of a written statement from Heather when it was originally requested**, I do not believe there is enough evidence to overturn the documented verbal warning. The avoidance of this statement is most concerning to me." (emphasis added, Exhibits R15). Furthermore, as per the Employee Discipline Policy 203.10(C)(1), attached to and incorporated in the

CBA (Exhibit R3), "All discipline will generally be administered within 15 days of the company's knowledge of the incident or the company will notify the employee." In Ms. Rebarchak's case, the Company had to move forward with the discipline despite the fact she refused to cooperate.

Ms. Rebarchak's refusal to provide the information was not only a violation of Section 8(b)(3), it was also insubordination which is a violation of the CBA Rules of Conduct, B.7(b)(1) (Exhibit R3), as discussed in more detail below. MTC then issued discipline for the actual incident, a verbal warning, based on the only evidence it had available at that time which did not include any statement from Ms. Rebarchak's as she refused to cooperate (Exhibits R11, R12, R13, R14, R15, R17, R18). The evidence MTC had at the time included two individual statements from Stephanie Clonski and Christopher Ramirez. (Exhibits R19 and R20 respectively).

Ms. Rebarchak and the Union subsequently filed a grievance as to the verbal warning given to Ms. Rebarchak (Exhibit R16). The Union's written grievance, (Exhibit R16), stated, "We grieve Article(s) 9.11, attached discipline policy . . . " Article 9.11 of the CBA is the "Just Cause" provision (Exhibit R3). The Union alleged in the written grievance (Exhibit R16), *inter alia*, that "It is the Union's position that the contract was violated, because there is no evidence to back up the discipline. . . . Based on the fact the allegations cannot be proven there are no grounds for discipline."

Thus, the Union was frustrating the purpose of the CBA (Exhibit R3). The Union was stating that they were grieving the discipline as there was no evidence to support the discipline and yet, Ms. Rebarchak refused to provide any evidence to support or deny the discipline. Specifically, the Union was frustrating the purpose of the Just Cause provision

(Article 9.11 Employee Security), the Grievance/Arbitration Procedure provision (Article 13), the Rules of Conduct provision of the CBA (Article 9.12 "Policies" and attached Rules of Conduct B.7.(b)(1) "insubordination"), and the Rules of Discipline provision of the CBA (Article 9.12 "Policies" and attached Rules of Discipline C.1.). The Union was also violating Section 8 (b)(3) of the Act by refusing to provide information.

B. The evidence is clear that the CGC's Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) by requiring Ms. Rebarchak to give a truthful written statement regarding the events of the incident as per the CBA and the law, MTC's actions were necessary as it has the "Just Cause" burden of proof.

As per the CBA (Exhibit R3), and applicable case law, the Company has the burden of proof that any discipline given was for "just cause" (Exhibit R3, Article 9.11 Employee Security). This *Just Cause* standard requires that the Company prove seven elements which are in brief:

1. Notice must be given to the employee of the misconduct and its consequences.
2. The rules must be reasonable.
3. A thorough investigation must be completed including considering all sides to the dispute.
4. The investigation must be fair.
5. There must be proof of the misconduct charged.
6. There must be equal treatment and consistent enforcement.
7. The degree of discipline must be reasonably related to the seriousness of the employee's proven offense.

See generally, Just Cause The Seven Tests, Koven & Smith, Second Edition 2004.

The Union's and Ms. Rebarchak's refusal to cooperate in the Company's investigation of the job related initial incident, and the investigation of Ms. Rebarchak's subsequent grievance, was frustrating the purpose of the CBA and denying the Company its right to properly defend itself. Specifically, the Company would not be able to prove the necessary Just Cause elements:

3) That the Company conducted a thorough investigation and considered the Union's/Employee's side to the dispute.

4) That the Company conducted a fair investigation including obtaining statements from all witnesses.

5) That the Company had adequate proof of the misconduct.

As stated in above, in *Cook*, Id., the D.C. Court of Appeals held that an employee does not have an automatic right to refuse to respond to questions concerning a matter that has been scheduled for arbitration. The Court also held that the Board may not attempt to spur an employer to "a painstaking investigation at the outset" once a grievance is filed. Id. at 721-722.

In the case at hand, even though the Company initially asked for the information before the discipline was issued, (Exhibits R15 and R17), the various times when MTC asked for Ms. Rebarchak's statement is irrelevant. The Cook decision held the following:

> *"The prevalence of pre-arbitration interviews has been noted by one of the industry's most preeminent arbitrators. In the arbitration case preceding the Board decision in Pacific Southwest Airlines, supra, Professor Edgar A. Jones, Jr., a professor of labor law and evidence at UCLA Law School and President-elect of the National Academy of Arbitrators, observed in his opinion that: It is almost routine for a union or an employer advocate lawyer or not to go to the locale of a pending arbitration a day or two before a scheduled hearing in order to interview witnesses and plan the details of the morrow's presentation. It is not at all unusual for that pre-hearing occasion to be the first time that the advocate has had the chance to get first-hand accounts of witnesses, to identify possible discrepancies among their accounts, to press them as a*

cross-examiner is apt to, to observe their demeanor and evaluate their credibility, to assess the potential influence on the course of the hearing of what they have to say and how they are apt to say it in the context of the hearing. Contrary to the impression expressed by the Union representatives and the potential witnesses in this case, that kind of encounter immediately before a hearing is simply not in itself a "dirty pool" situation. Instead, it is an important part of the administration of the grievance procedure. It is by no means unusual for cases to be settled on the day or even the hour before the hearing is to convene based on the advocate's last-minute, eye-opened assessment of the significance of these pre-hearing contacts."

Cook Paint & Varnish Co. v. NLRB, 1981 U.S. App. LEXIS 14690, 26-28 (D.C. Cir. 1981).

The decision continued along these lines stating,

"Given this practice in industrial relations, acknowledged by the Board in Pacific Southwest, we do not believe that the Board in the present case has established by substantial evidence that an employer demand for a pre-arbitration interview coerces employees in the exercise of protected legal rights. At that interview, an employer advocate may, perhaps for the first time, obtain factual information from witnesses, observe demeanor, and in general evaluate the merits of a pending dispute. On the basis of the record established by the Board, we are unable to perceive the manner in which such a limited investigation coerces protected employee rights. As a result, we hold that an employee does not have an automatic right to refuse to respond to questions concerning a matter that has been scheduled for arbitration.

This decision is consistent with the fundamental nature of the arbitration process. Arbitration is a matter of contract between the parties, noted for its flexibility and informality. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The Supreme Court has stated that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution." Alexander v. Gardner-Denver Co., 415 U.S. 36, 58, 94 S. Ct. 1011, 1024, 39 L. Ed. 2d 147 (1974). As noted in Abrams, The Integrity of the Arbitral Process, 76 Mich.L.Rev. 231, 235 (1977), "arbitration procedure remains, for the most part, a matter of the parties' choice."

Id. at 30.

Even though CGC files the Cross-Exceptions based on the various stages of the investigatory interview, the *Cook* court found no material difference in whether an investigatory interview was scheduled before the disciplinary action was taken, after a grievance was filed, or after a demand for arbitration was filed.

MTC asked Ms. Rebarchak for a statement **before** the discipline was issued. (Exhibits R15 and R17). Ms. Rebarchak refused to comply in violation of Section 8(b)(3) and in violation of the CBA Rules of Conduct. (Exhibit R3). After the discipline was issued, Ms. Rebarchak filed a written grievance (Exhibit R16). As per the CBA's Just Cause provision (Section 9.11, Exhibit R3), MTC then made a second request (General Counsel's Exhibit 12), and third request (General Counsel's Exhibit 13), for this information.

As per Cook, Id., it is irrelevant whether or not MTC had issued the discipline to Ms. Rebarchak prior to MTC making a second and third request on January 15, 2013, and January 31, 2013, (General Counsel's Exhibits 12 and 13 respectively), for Ms. Rebarchak's written statement. Unlike in *Cook*, Id., the Union in this case had not yet filed for arbitration on Ms. Rebarchak's discipline. As to Ms. Rebarchak, the Union's demand for arbitration was not filed until April 25, 2013, (Exhibit R10). But, even if the Union had already filed for arbitration on Ms. Rebarchak's behalf, and the Company then made its second and third requests for a statement, under Cook, the Company did not violate Section 8(a)(1).

All three CBA's between the parties (Professional, Maintenance, and Residential Advisors) contain a grievance and arbitration provision which allow the parties to adjust the grievance at each step of the grievance procedure. (*See*, Exhibits R3, Article 13 "Grievance/Arbitration Procedure"; Exhibit R4, Article 15 "Complaint and Grievance Procedure"; and Exhibit R5, Article 13, "Grievance and Arbitration Procedure.").

It is implied that at each and every step of the grievance process, the respective Company respondent should take a fresh look at the subject grievance to carefully examine the evidence with a "new set of eyes" so to speak. Without this implication, the three or four steps (as the respective case may be) in the grievance process have no meaning and

makes the numerous steps, which the parties had bargained for, obsolete. At each and every step of the grievance process, the Company may adjust the employee's discipline and this does occur at various times (Exhibits R8 and R9). The Union admits that this type of adjustment occurs even without a settlement agreement. Specifically, Ms. Yost testified as follows:

- "Q: What would you say the purpose of the grievance process is?
  A: The purpose of the grievance process is for the Union to be able to—resolve differences. And if the parties can't agree to what those differences are it would go to arbitration.
  Q: And in resolving those differences, does it ever involve adjusting the discipline?
  A: Yes. As a settlement it could. Yes.
  Q: Without a set—formal settlement agreement can it involve adjusting discipline? . . .
  Q: A formal settlement agreement, I would send you a document saying you agree you're not going to take this to arbitration and you're going to drop this matter. Whereas, during the grievance process is it not possible that there are times where the employee's grievance is upheld in part or in whole and discipline can be adjusted without a formal settlement agreement?
  A: Yeah, there have been times." (pg. 70, lines 3-25).

C. The evidence shows that the CGC's Cross-Exceptions are without merit because MTC did not violate Section 8(a)(1) when, during an investigation of Ms. Rebarchak's grievance, MTC required Ms. Rebarchak to provide a truthful written statement regarding the events of the incident because as per the CBA, Ms. Rebarchak has a duty to be subordinate and truthful.

Ms. Rebarchak's refusal to give a written statement regarding the initial incident when requested by the Company, was insubordination in and of itself. (Exhibit R3, Article 9.12 "Policies," and attached Rules of Conduct B.7(b)(1) "insubordination").

Additionally, the majority view of arbitrators is that "Both sides to a disciplinary dispute have mutual obligations with respect to determining all the facts and circumstances, which reflect the parties' mutual rights and responsibilities within the collective bargaining relationship. An employee's duty to cooperate applies not only when his own conduct is being investigated, but when another employee is under suspicion. . . .

the company may justifiably require an employee to cooperate in an investigation in the following ways: Answer questions in connection with suspected misconduct; . . . Provide other relevant evidence as the particular situation demands."

See, Just Cause The Seven Tests, Koven & Smith, Second Edition 2004, pgs. 188-189, footnotes and citations omitted.

> *"In many cases arbitrators have upheld the company's right to discipline or discharge an employee for refusing to cooperate with a legitimate investigation. Refusal to cooperate is sometimes viewed as insubordination by employers and arbitrators . . . The main reason for this view is that the right to require cooperation in investigations of suspected misconduct is considered by management to be essential to the running of its business. . . . Refusal to cooperate is also related to insubordination in that management authority is challenged when an employee refuses to answer questions or otherwise to provide needed information. Discipline for noncooperation has been justified on the ground that it reflects an indifference to company rules and to the employer's legitimate need . . . Management has a right to expect an employee to tell the truth when it is investigating an act of misconduct . . ."*

Id., pages 196-197 footnotes and citations omitted.

As per element #6 of the *Just Cause* standard as stated in the prior section above, if the Company is going to discipline any employee for insubordination at any time, the Company must discipline all employees for insubordination as there must be equal treatment and consistent enforcement.

If the Company is going to discipline any other employees for insubordination at any time, element #6 of Just Cause, (requirement of equal treatment and consistent enforcement), demands that Ms. Rebarchak be disciplined at this time if she was insubordinate. Next, if the Company is going to discipline Ms. Rebarchak for insubordination for refusing to cooperate in an investigation, the Company is required to meet all of the Just Cause elements for the insubordination discipline.

In meeting all of those elements, it required the Company to comply with the following: #1- putting Ms. Rebarchak on notice that she could be disciplined for

misconduct and the consequences of such discipline. General Counsel's Exhibits 12 and 13 demonstrate just that. MTC was putting Ms. Rebarchak on notice of the potential misconduct, specifically, insubordination, or in the alternative, giving a statement but one which is untruthful. MTC put the Union and Ms. Rebarchak on notice that these potential actions were violations of the Rules of Conduct (attached to and incorporated therein as Article 9.12 "Polices" of the CBA labeled Exhibit R3).

MTC did not violate Section 8(a)(1) of the Act when during an investigation of a grievance filed by M.s Rebarchak, MTC required Ms. Rebarchak to provide a truthful written statement because: As per section 8(b)(3) the Union has a duty to provide information in the context of a grievance; As per the CBA and the law, MTC's actions were necessary as it has the "Just Cause" burden of proof and; As per the CBA, Ms. Rebarchak has a duty to be subordinate and truthful. Thus, CGC's exceptions 1, 8-10 are without merit and should be denied.

Cross-Exception 5

The Company does not object to the CGC Cross-Exception 5 related to a typographical error as to a date.

Cross-Exceptions 2-4, 6-7, 11-17

The CGC files it Cross-Exceptions 2-4, 6-7, and 11-17 all related to the Union's information request. The ALJ found, and the CGC has not filed an exception to, the ALJ's finding that "Respondent at no time during negotiations claimed it was **unable** to increase unit employees' wages. It stated, to the contrary, that it was **unwilling** to pay any increases." (emphasis added ALJD 7:4-10). During bargaining the Company never made any claim nor alleged that it was unable to afford the terms and conditions proposed by the Union in negotiations as dictated by

the DOL contract, only that the Company was "unwilling:" (ALJD p.6, lines 26-28). The CGC did not file any exception to this finding. Furthermore, The Company manages the Keystone Job Corps Center ("KJCC") in Drums, Pennsylvania, under a contract with the DOL. (ALJD p.2, lines 8-11). The CGC did not file any cross-exceptions to this fact because it is obvious that the DOL contract between the Company and the DOL contains confidential financial information to manage the KJCC.

II. THE CGC's CROSS-EXCEPTIONS 2-4, 6-7, AND 11-17 ARE WITHOUT MERIT BECAUSE THE COMPANY DID NOT REFUSE TO PROVIDE, AND/OR UNREASONABLY DELAY IN PROVIDING, RELEVANT AND NECESSARY INFORMATION REQUESTED BY THE UNION ON JUNE 29, 2012 BECAUSE:

A. THE EVIDENCE SHOWS THAT MTC RESPONDED TO MOST OF THE REQUESTS PRIOR TO JUNE 29, 2012.

B. THE EVIDENCE SHOWS THAT THE INFORMATION REQUESTED BY THE UNION WAS IRRELEVANT AS:

1. **THE COMPANY NEVER MADE ANY CLAIMS IN ITS BARGAINING PROPOSALS TO MAKE THE REQUEST RELEVANT;**
2. **THE REQUEST SOUGHT WAGES AND INFORMATION AS TO NON-BARGAINING UNIT EMPLOYEES;**
3. **THE INFORMATION REQUESTED BY THE UNION WAS CONFIDENTIAL AND PROPRIETARY.**

C. THERE WAS NO UNREASONABLE DELAY BECAUSE:

1. **THE UNION ADMITTED THAT THE COMPANY HAD PREVIOUSLY RESPONDED TO MOST OF THE REQUEST WHETHER IT WAS RELEVANT OR IRRELEVANT.**
2. **THE UNION NEVER RESPONDED TO THE COMPANY'S CLAIM THAT THE INFORMATION WAS IRRELEVANT;**

These arguments are discussed in more detail below:

A. The Evidence is clear that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request because MTC provided the majority of the

information requested on June 29, 2012, prior to the Union's written request of June 29, 2012.

Paragraph 8(c) of the Amended Consolidated Complaint alleges that, "Since on or about June 29, 2012, Respondent has failed and refused to furnish the Union with the information requested by it as described above in items 1,2,3,5,6,7,8,10,12,13,14,15, and 16 in Appendix A."

However, the sole factual allegation on which the General Counsel relies, shows that the Union admitted that MTC had already provided most of the information the Union requested on June 29, 2012, prior to the Union's June 29, 2012, request. (Paragraph 8(c) of the Amended Consolidated Complaint which is the June 29, 2012, Union information request, General Counsel's Exhibit 7). Specifically, in the Union's June 29, 2012, information request it states, "As negotiations have progressed, we have asked for many pieces of information, **most responses have been given** verbally."

Furthermore, Kim Yost, Union Business Agent, testified as follows:

- "Q: Okay. Referring back to General Counsel's Exhibit 3 . . . Was there any discussion – any response at the table to your request for the RA's pay grade for the DOL?
  A: I believe they did give us the pay grade per the DOL."
  (pg. 24, lines 17-21.)
- Q: Okay. And did they give you the security pay grade per DOL?
  A: Yes, they did."
  (pg.24, lines24-25, pg. 25, line 1)
- Q: Okay. And the residential advisors start rates, did they provide you with that?
  A: I believe they did."
  (pg. 25, line 4-6).

Thus, since the Union admits that the Company provided most of the information sought prior to the June 29, 2012, request, the CGC's Cross-Exceptions are without merit as the Company has not violated Section 8(a)(1) nor Section 5.

B. The Evidence is clear that the CGC's Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request as the majority of information requested by the Union was irrelevant.

Under Nestle Dairy Systems, Inc., it is well established that relevancy is prerequisite to the right of a union to obtain information; therefore, since an employer cannot be required to furnish irrelevant information, it follows that employer does not have to respond to request for such information. Nestle Dairy Systems, Inc. a/k/a Nestle Ice Cream Company (1994) NLRB Advice Memo Case No. 31-CA-20211.

General Counsel's only factual allegation under this charge (Charge #04-CA-095456), relates to a Union information request dated June 29, 2012. (*See*, paragraph 8(a) of the Amended Consolidated Complaint, Charge #04-CA-095456.)[2]

This sole June 29, 2012 information request was entered into evidence during the hearing as General Counsel's Exhibit 7. The Union made a total of 17 information requests. In total, 14 out of 17 questions, (82%), were not relevant and/or requested confidential/proprietary information.

- 11 of the 17 questions (almost 65% of the questions), were related to non-bargaining unit employees; and
- 3 of the 11 questions related to the Company's proprietary financial information.

Because 82% of the questions contained in the June 29, 2012, request sought irrelevant information, under Nestle Dairy Systems, Inc., Id., the Company had no duty to respond to

[2] General Counsel has not put MTC on proper notice of any other information request made by the Union that would amount to a violation of the Act as there are no other allegations in the Amended Consolidated Complaint supporting such. General Counsel has introduced General Counsel's Exhibit 3 during hearing which was not a factual allegation included in the Amended Consolidated Complaint but regardless, also sought irrelevant information as to a rumor about a non-bargaining unit employees (security) pay increase.

those.[3] Nevertheless, on the same day as the Union's request was made, the Company informed the Union which requests were irrelevant as they sought either non-bargaining unit employee information or proprietary/confidential information. (General Counsel's Exhibit 7).

Thus, The CGC's Cross-Exceptions should be denied as the evidence shows that the majority of information requested by the Union was irrelevant.

B.1. The Evidence is clear that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request as the majority of information requested by the Union was irrelevant because the Company never made any claims in its bargaining proposals to make the information request relevant.

Because the Company never claimed that it had an inability to pay wages, nor claimed that the Company's wage proposal was based on non-bargaining unit employee wages or pay grade, the Union's request for these items was irrelevant.

It is well established by the U.S. Supreme Court that an employer who makes certain **claims** in collective bargaining negotiations has duty to furnish the union with information to support such claims. NLRB v. Truitt Mfg. Co. (1956) 351 US 149. *See also*, Pine Indus. Relations Comm., 118 NLRB 1055 (1957), enforced sub nom. Woodworkers Locals 6-7 & 6-22 v. NLRB, 263 F.2d 483 (D.C. Cir. 1959).

An employer such as MTC that simply expresses an unwillingness to pay, rather than an inability to pay, is not required to make any financial disclosure. Richmond Recording Corp. dba PRC Recording Co., 280 NLRB 615 (1986).

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[3] Although no violation was alleged in relation to General Counsel's Exhibit 3, said exhibit was seeking information to prove or disprove whether or not non-bargaining unit personnel (security employees) received a pay increase. Since the non-bargaining personnel information was irrelevant, under Nestle Dairy Systems, Inc., Id., the Company had no duty to respond whatsoever.

The evidence in the case at hand is undisputed that the Company never made a claim of inability to pay wages ("plea of poverty"), only an unwillingness to pay. Repeatedly MTC clearly stated that it "is not willing to give any labor increase." See evidence citations below. Additionally, MTC never claimed that the Company's proposals were based on non-bargaining unit employee pay or ranking. This evidence is as follows:

- General Counsel's Exhibit 2, MTC's Response to Union Proposals 4-11-12 9:15am, which states in pertinent part:
    - "Section 6.1 Wage Rates: Reject. DOL has given a 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
    - "Section 6.2 Night Shift Premium: Reject. MTC wants to pay employees for working, not for not working. This would be a differential on top of monies already being paid for not working (vacation, sick and holidays)."
    - "Section 6.5 Pay for Work in Higher Rated Occupational Classifications: Reject. DOL has given 0% operational increase this year. MTC is **not willing** to give any labor increase." (emphasis added).
    - "Section 6.7 (New Section Wage Proposal re:Lonegevity): Reject. DOL has given 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
- General Counsel's Exhibit 4, MTC's Response to Union Proposals 5-8-12 10:25am, which states in pertinent part:
    - "Section 6.1 Wage Rates: Reject. DOL has given a 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
    - "Section 6.2 Night Shift Premium: Reject. MTC wants to pay employees for working, not for not working. This would be a differential on top of monies already being paid for not working (vacation, sick and holidays)."
    - "Section 6.5 Pay for Work in Higher Rated Occupational Classifications: Reject. DOL has given 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
    - "Section 6.7 (New Section Wage Proposal re: Lonegevity): Reject. DOL has given 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
- General Counsel's Exhibit 5, MTC's Response to Union Proposals 5-8-12 3:20pm, which states in pertinent part:

- "Section 6.1 Wage Rates: Reject. DOL has given a 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
- "Section 6.5 Pay for Work in Higher Rated Occupational Classifications: Reject. DOL has given 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).

- General Counsel's Exhibit 6, MTC's Response to Union Proposals 5-9-12 11:45am, which states in pertinent part:

  - "Section 6.1 Wage Rates: Reject. DOL has given a 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).
  - "Section 6.5 Pay for Work in Higher Rated Occupational Classifications: Reject. DOL has given 0% operational increase this contract year. MTC is **not willing** to give any labor increase." (emphasis added).

- General Counsel's Exhibit 7 and Exhibit 8, which is MTC's same day response to the Union's June 29, 2012, information request, which states in pertinent part:
  - "Any and all verbal representations as to finances made by MTC, **if any**,[4] are rescinded. Any documentation provided is not rescinded as the record speaks for itself. Please see my initial responses below.
  - MTC's formal position is as follows:
  - **MTC is not making a 'plea of poverty.'**
  - **MTC has the ability to pay** the wages and benefits as required in the current CBA's.
  - MTC is offering a 0% wage increase for each of the three bargaining units."

    (emphasis added.)

- General Counsel's Exhibit 15, which is the affidavit of Michael Martine which states in pertinent part:

  - "The Union brought up the issue of security guards, who are non-unit employees, receiving a pay increase." (pg 2, first paragraph).
  - "During the discussions, the Union raised the issue of 'under-run.'" (pg 2, second paragraph).
  - "I never told the Union that this facility had under-runs. The Union asked about under-runs . . ." (pg 2, second paragraph).
  - "At the June 21, 2012, meeting, one of the Union's employee bargaining committee members, Renee Arnold, asked a question about a rumor she heard of

[4] Emphasis in original.

the Residential Living Supervisors[5] receiving a $280 bonuses effective June 30th." (pg 3, first full paragraph).

- Testimony of Union Business Agent Kim Yost:

  - "DOL had implemented a zero percent inflationary cap for all the years of the five year contract. And that MTC chose not to give a wage increase." (pg. 19, Lines 17-19)
  - "Q: Did they give any other reason why they were proposing a zero percent?
    A: No, I believe it just was the DOL inflationary cap." (pg. 19, Lines 20-22.)
  - "Q: Okay. And with respect to the proposals and the wage reopener bargaining for the residential advisors, what was the Employer's Proposal there?
    A: It was also the zero percent because of the DOL inflationary cap, and that MTC chose not to give any raise increase.
    Q: Okay. And what about in reopener bargaining for the professional unit?
    A: It was the same; the zero percent DOL inflationary cap, and that MTC chose to give no increase." (pg. 20, Lines 1-10.)
  - "Q: What was the only reason –what was the reason that the Company gave for no wage increases? . . .
    A: Okay. You indicated that there was the zero percent DOL inflationary cap. And in addition that MTC chose not to give wage increases." (pg.58, lines 19-25).
  - "Q: Did the Company ever make a plea of poverty, stating it would go out of business if it had to pay the employees the current wages?
    A: No." (pg. 59, lines 11-14).

The record is clear that Union admits, that the Company's only reasoning for not giving a wage increase was based on the zero percent DOL inflationary cap. The Union also admits, that the Company gave the Union proof of this reasoning in 2011 prior to the negotiations. Specifically Ms. Yost testified,

- "Q: Did the company provide you with a copy of the memo from the DOL showing that there was a zero percent increase?
  A: Yes.
  Q: When did the Company provide that to you?
  A: I believe I may have received that one back in 2011, maybe. It was prior to the negotiations." (pg. 59, lines 2-7)."

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[5] Residential Living Supervisors are non-bargaining unit members. See, Exhibit R5, pg. 7, Article "Recognition."

The record also reflect that this proof of this reasoning of the zero percent inflationary cap via the DOL memo was provided to the Union on June 28, 2011. Exhibit R48.

B.2. The Evidence is clear that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request as the Union sought wages and information as to non-bargaining unit employees.

Under United States Postal Service case in the 3rd Circuit, "[W]hen a union demand information concerning nonunit employees . . . the bargaining representative must demonstrate the probable or potential relevance of the information to its representation of union employees. NLRB v. United States Postal Serv., 18 F.3d 1089 (3rd Cir. 1994).

The Board has held in Beverly Cal. Corp. that such relevancy can be shown by presenting objective facts, or other circumstances that establish the relevance of requested information. Beverly Cal. Corp. fka Beverly Enters. v. NLRB, 227 F.3d 817 (7th Cir. 2000). Situations when information regarding non-unit employees would be relevant:

- If BU work was being relocated to another facility;
- If non-BU employees were hired to specifically perform BU work;
- Reasonable belief of alter ego; or
- If the CBA contained a provision that BU employees' wages would be based on the current non-BU employee wages.

As per Island Creek Coal Co., it is well established that mere boilerplate assertions that requested information is necessary to represent employees intelligently is insufficient to establish relevance. Island Creek Coal Co. v. NLRB (1990, CA6) 1990 US App Lexis 5685.

The Union never gave any reasons nor provided the Company with any facts as to why their information requests for non-bargaining unit wages were relevant. It wasn't until Ms.

Yost's testimony at the hearing that the Union first provided a reason why the Union thought the information was relevant.

The Union's reasons were first given during the hearing and were merely boilerplate assertions. Although not previously provided to the Company before the hearing, at the hearing Ms. Yost specifically testified that the non-bargaining unit information was important to the Union because, "first and foremost we didn't want to be negotiating in a vacuum." (pg. 22, lines 23-24; *See also*, pg. 23, lines 1-3; pg. 31, line 13; pg. 34, lines 12-13). Not wanting to "operate in a vacuum" is a boilerplate assertion and does not make non-bargaining unit wages and pay grades "relevant" information. Nevertheless, no reason was ever given by the Union to the Company prior to the hearing.

Furthermore, the Union admits that during the negotiations in question, the Company never made a claim that the Company's wage proposal was based on the non-bargaining unit employees' wages or pay rate. Specifically, Ms. Yost testified as follows:

- "Q: Did the Company ever state that it was making its wage proposal based on bonus monies given out to non-bargaining unit employees?
  A: No.
  Q: Did the Company ever state that it was making its wage proposals based on the pay grade of security officers?
  A: No.
  Q: Did the Company ever state that it was making its wage proposals based on the pay grade that it was paying recreation?
  A: No.
  Q: Did the Company it was ever make a statement that it was makings its proposals based on the starting rate it was paying security officers?
  A: No.
  Q: Did the Company ever make a statement or claim that it was making its wage proposals based on the starting rates for the recreation aids?
  A: No.
  Q: Did the Company ever make a statement or claim that it was making its wage proposals based on the DOL established minimum and maximum for the security employees at the Company?
  A: No.

Q: Did the Company ever state that it was making its wage proposals based on the minimum and maximum DOL established rates for recreation aids?
A: No."
(pg. 59, lines 20-25, pg. 60, lines 1-20.)

- "Q: And so did the Company ever state it was making its wage proposals to all three bargaining units based on the fact that there was money given to security and recreation aids that were Rocco monies?
  A: No." (pg.63, lines 2-6.)

- "Q: Are there any provision in any of the CBA's that require that the bargaining unit members pay be based on the non-bargaining unit members pay?
  A: No." (pg. 66, lines 17-20).

Once again, only at the hearing, and not before when the Company requested it, Ms. Yost alleged that another reason why non-bargaining unit information was relevant was because during negotiations with the Company approximately 15 years ago, a member of the management negotiating team showed the Union a "pie chart" and stated that the pie was only so big. (pg. 23, lines 14-21; pg. 35, lines3-5; pg. 63, lines 8-25; pg. 64 lines 1-3). This allegation from 15 years ago is another mere boilerplate assertion and has no relevance on the current contract negotiations. The Union cannot bootstrap irrelevant information requests now, and the CGC cannot make Cross-Exceptions now, in an attempt to make them relevant, based on an allegation that 15 years ago and many contracts ago, that a member of management showed the Union a "pie chart."

B.3. The Evidence is clear that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request as the Union sought proprietary and confidential information.

The Company never made any claim of financial inability or plea of poverty. Therefore, the Union does not have a right to access the Company's financial records including but not limited to its proprietary and confidential information contained: 1) In its

contract with its client, the DOL, and 2) In its financial records relating to the difference between its revenue and expenditures, a.k.a., its "under run" monies.

The unqualified discovery-type rule is not tailored to the plea of poverty situation. "The union is entitled only to what is reasonably necessary to properly to represent it members **in light of the employer's triggering claim of financial inability**." Teleprompter Corp. v. NLRB, 570 F.2d 4, 8 (1st Cir. 1977).

"Because the validity of a claim is not at issue until it is actually made, an employer is not obligated to demonstrate that it is unable to raise wages unless it first claims such an inability." Pine Indus. Relations Comm., 118 NLRB 1055 (1957), enforced sub nom. Woodworkers Locals 6-7 & 6-22 v. NLRB, 263 F.2d 483 (D.C. Cir. 1959). See also, Printing Pressmen Local 51 (New York) (Milbin Priniting) v. NLRB, 538 F.2d 496, (2nd Cir. 1976).

The Company never made a plea of poverty or inability to pay current wages as demonstrated above. The Company only based its wage proposal on the DOL operational increase/inflationary rate is expressly what the Company had proposed during the 2012 Maintenance negotiations as demonstrated above. *See also*, General Counsel's Exhibits 2, 4, 5, 6, 14. *See also*, Exhibits R36 and R37.

The Union had claimed through the testimony of Ms. Yost, and the CGC now files Cross-Exceptions, that the Company usually would give a wage increase based on the under run monies. (pg. 29, lines17-19). Not only is this false but, during the current negotiations that are the subject of this hearing, the Company never claimed its current wage proposal was based on under run monies. The Company repeatedly stated that its wage proposal was based on the fact that the DOL had given a zero percent operational increase/inflationary rate.

As to the parties' prior wage agreement shows that the prior wage increase was based solely on the DOL operational increase/inflationary rate, and was not related to any "under-run" monies as alleged by Yost's testimony. *See*, Exhibits R42-R49.

Specifically, these exhibits establish that during previous negotiations for a prior agreement, the DOL operational increase/inflationary rate, was strictly what was used, and demanded by the Union, in providing a wage increase to the Union. It is also important to note that "under-run" money was never discussed or contemplated by the parties as to any wage increase. If under-run monies were ever discussed, it was not based on a trigger claim by the Company to support its proposals but based on the Union raising the issue. These Exhibits are as follows:

- Exhibit R42: The Union's prior acceptance of the Company Maintenance bargaining unit wage proposal based on the DOL operational increase/inflationary rate.
- Exhibit R43: The Company's prior wage proposal for the Maintenance bargaining unit based on the DOL operational increase/inflationary rate.
- Exhibit R44: The Company's correction of the DOL operational increase/inflationary rate applicable to the facility contract and, the Company's wage proposal for the Maintenance bargaining unit based on the DOL operational increase/inflationary rate.
- Exhibit R45: The Company responding to the Union's request for information for the DOL Memo establishing the DOL operational increase/inflationary rate.
- Exhibit R46: The Union's clarification of the DOL operational increase/inflationary rate applicable to the facility contract.
- Exhibit R47: The Union's acceptance of the Company Maintenance bargaining unit wage proposal based on the DOL operational increase/inflationary rate.

- Exhibit R48: The Company's wage proposal for all three bargaining units (Maintenance, Professionals, and RA's) based on the DOL operational increase/inflationary rate and, applicable DOL memo attached.
- Exhibit R49: The Union's acceptance of the Company Professional bargaining unit and RA bargaining unit wage proposal based on the DOL operational increase/inflationary rate.

Furthermore, even if an employer initially asserts an inability to pay, the Board has held that it will not direct the employer to furnish the requested financial information, based on its finding that the employer effectively withdrew and retracted its claim in inability to pay by stating in a subsequent contract proposal that the company did not claim an inability to pay. Giberton Coal Co., 291 NLRB 344, 769, (1988), enforced, 888 F.2d 1381 (3rd Cir. 1989).

In the case at hand MTC never stated it had an inability to pay however, even if it had, each and every bargaining proposal the Company stated it was "not willing" to pay more. Additionally, as in Gilberton Coal Co., Id., even if such a statement had been made, the Company clearly retracted it.

Specifically, General Counsel's Exhibit 7 and Exhibit 8, which is MTC's same day response to the Union's June 29, 2012, information request, states in pertinent part:

- "Any and all verbal representations as to finances made by MTC, **if any**,[6] are rescinded. Any documentation provided is not rescinded as the record speaks for itself. Please see my initial responses below.
  MTC's formal position is as follows:
  1) **MTC is not making a 'plea of poverty.'**
  2) **MTC has the ability to pay** the wages and benefits as required in the current CBA's.

[6] Emphasis in original.

3) MTC is offering a 0% wage increase for each of the three bargaining units."

(emphasis added).

The bottom line is that Union submitted this information request to harass the Company since the Union was upset that the Company was offering the standard DOL inflationary rate to the Union, in accordance with past practice, which during this time was at 0% increase. Based on the foregoing, CGC Cross-Exceptions are without merit.

C.1. The Evidence is clear that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request as there was no unreasonable delay because the Union admitted that the Company had previous responded to most of the request.

The Union admits that the Company had provided the majority of the information sought previous to the June 29, 2012, information request. This argument is discussed in detail with all evidence above.

C.2. The Evidence is clear that the CGC Cross-Exceptions are without merit as MTC did not violate Section 8(a)(1) nor Section 5 in relation to the Union's June 29, 2012, information request as there was no unreasonable delay because the Union never responded to the Company's claim that the information was irrelevant.

On the same day the Union made its information request, the Company responded to the Union stating which items were irrelevant. (General Counsel Exhibit 7). The law is clear that the burden then shifts to the Union to demonstrate the relevancy of those requests.

The CGC also makes a Cross-Exception to the Judge's failure to find that on May 1, 2012, the Union made an information request by email, shown at General Counsel Exhibit 3. Once again, that exhibit solely went to "**rumors**" strictly about non-bargaining unit employees. The CGC misplaces its reasoning for its Cross-Exceptions based on claim

or "rumors" made by the Union, not claims made by the Company. Any responses made by the Company was in response to a Union question as to **rumors** about bonuses or increases given to ***non-bargaining unit*** members including, but not limited to, security employees, supervisors, and managers. This is supported by and email from Kim Yost, Union Business Agent stating, "I have recently heard **rumors** that despite the 0% DOL increase all employees in **security** have received a $2.00 per hour wage increase." (emphasis added) See, GC Ex. 3. This is also supported by the testimony of Kim Yost as to the security employees which are non-bargaining unit employees:

"Q: Why were you requesting that information?
A: We **had heard** that security had received increases . . .
Q: Is the security department represented by the Union
A: No, they're not." (emphasis added) (pg. 21 lines 8-13)
"Q: And why did that matter to bargaining?
A: . . . we didn't want to be negotiating in a vacuum. But also it – it makes it very difficult to get a contract agreed to if there are **rumors** out there that says you're offering – or you're offering us zero at the table, but there are **rumors** floating around that you gave other people increases? . . ." (emphasis added) (pg. 22 lines 22-25, pg. 23 lines 1-3).
"Q: Okay. With respect to Item 2, your inquiry about bonuses, why did you request that information?
A: There had been **rumors** that were floating around Center that some **managers** had gotten bonuses, some **supervisors** had gotten bonuses, and we were just trying to find out the validity of it." (emphasis added) (pg. 30 lines 23-25, pg. 31 lines 1-3).
"Q: What difference would it make if folks outside the bargaining units were getting bonuses?
A: Again, it's the negotiating in a vacuum. Plus it's also the issue of, again, it's hard to negotiate and reach an agreement when, you know, you're offering us zero and there are **rumors** floating around that **managers and non-union employees** had gotten bonuses . . ." (emphasis added) (pg. 31 lines 11-17).

Any representation by the Company was a response to these **rumors** raised by the Union as to **non-bargaining unit employees** and not made by the Company to support any of the Company's proposals as the CGC attempts to suggest in the CGC's Brief in Support of Cross-Exceptions. Thus, the Company never made a triggering claim that any of its proposals were based on any increases, bonuses, or new pay scale given to non-bargaining unit members or pay

scale as contained in the DOL contract. There is simply no evidence to support such. All of the proposals given by the Company clearly show that the Company's proposals were never based on this alleged response to the rumors raised by the Union. *See*, GC Exhibits 2, 4, 5, 6, 14, and Exhibits R2, R23, R33, R34, R35, R36, R37, R38.

Under United States Postal Service case in the 3rd Circuit, "[W]hen a union demands information concerning nonunit employees . . . the bargaining representative must demonstrate the probable or potential relevance of the information to its representation of union employees. NLRB v. United States Postal Serv., 18 F.3d 1089 (3rd Cir. 1994).

The Board has held in Beverly Cal. Corp., that such relevancy can be shown by presenting objective facts, or other circumstances that establish the relevance of requested information. Beverly Cal. Corp. fka Beverly Enters. v. NLRB, 227 F.3d 817 (7th Cir. 2000).

The Union never responded to the Company as to the relevancy of those items when the Company responded on June 29, 2011.

The 8th Circuit Court has held that an employer satisfied it duty to supply information when it provided what it had and the union did not renew it information request or otherwise indicate that it expected more information. Whitesell Corp., 355 NLRB No. 134 (2010), enforced, 638 F. 3d 883 (8th Cir. 2011).

In the case at hand, MTC provided the information that was relevant, and in some cases irrelevant, before the June 29, 2011, information request (see above discussion). MTC also provided such during negotiations (see above discussion and testimony of Yost). MTC no longer had a duty to respond to the Union since the Union failed to respond to MTC's claim that 85% of the request was irrelevant.

Cross-Exception 18

The CGC Cross-Exception 18 is related to the Judge's remedies. These are all based on the Judge's findings which are addressed in the Respondent's Brief in Support of its Exceptions and Respondent's Brief in Reply to Counsel for the General Counsel's Answering Brief to Respondent's Exceptions.

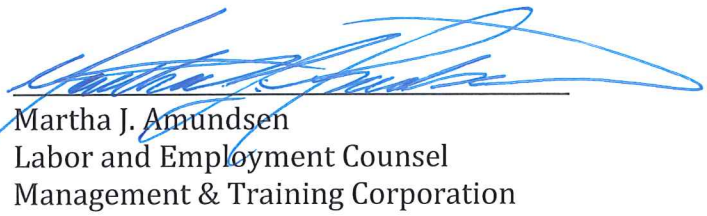
Cross-Exception 19

The CGC Cross-Exception 19 is related to the Judge's finding that Respondent's proposal on the number of stewards was not regressive. (ALJD 6:3). The evidence does not support the CGC's exception. The Company denies that its proposal as to Stewards was less than favorable, the written proposal speaks for itself, and the Company denies that it had any duty to make its proposals "more favorable" to the Union. The Company only sought to clarify an item in the CBA which had not been clarified in the past. Specifically, the Company stated, "Section 15.9 Stewards: Designation of Stewards: The prior CBA required that the parties agree to the number of shop stewards. The parties have not agreed during the entire prior term of the CBA so, now that the parties are in negotiations, this is the proper time to agree to such. . . ." (General Counsel's Exhibit 14, pg. 4, Section 15.9 "Stewards.")

Based on the foregoing and with notwithstanding CGC Exception 5, CGC Cross-Exceptions are without merit, and the Board should accordingly adopt the findings of the Judge and recommended Order to those items which CGC has excepted.

Dated: March 27, 2014

Respectfully submitted,



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